

Golden Gate University Law Review

Volume 43 | Issue 3

Article 4

August 2013

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Recommended Citation

Timothy Follett, *In re the Marriage of Ramirez: Sex, Lies, and California's Annulment for Fraud Based on Fidelity*, 43 Golden Gate U. L. Rev. 433 (2013).
<http://digitalcommons.law.ggu.edu/ggulrev/vol43/iss3/4>

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ARTICLE

IN RE THE MARRIAGE OF RAMIREZ: SEX, LIES, AND CALIFORNIA'S ANNULMENT FOR FRAUD BASED ON FIDELITY

*TIMOTHY FOLLETT**

INTRODUCTION

Imagine you are about to buy a car. Prior to making the purchase, you did your best to examine the car. You kicked the tires, looked under the hood, and drove it around the block. Then, you sat down with the salesperson, negotiated a price and signed a contract for sale. The salesperson hands you the keys, and you walk out to the car only to find that the car no longer has tires. Surely, this is not what you envisioned when you signed the contract. When you buy a car, the tires are naturally included. A car sold with tires is so common in society that it would be ludicrous to attempt to pass off the delivery of a car without tires. You have just been tricked into entering into a contract for sale by a fraudulent misrepresentation made by the salesperson. You would have never entered into the contract if the salesperson had said, "by the way, the tires are not included in this model." A claim for rescission would be an obvious recourse.

Now, imagine you are about to get married. Prior to entering into the marriage you did everything possible to get to know your future spouse and make sure you are a good match. On the eve of your wedding day, you look into your fiancé's eyes, hold him near to you and hear him declare, "I have been having an affair with your sister. Moreover, I intend to continue having relations with your sister even after we wed tomorrow." Almost no one would enter into a marriage after learning this fact. Just as a car delivered without tires is ludicrous, so is entering into a marriage after learning your spouse will not remain faithful. Most couples enter into a marriage contract with the expectation

of fidelity from the other party, just as the buyer of a car expects the car to have tires upon delivery.

In most states, if your fiancé had failed to disclose this material fact, and you married the slug only to find out his true subjective intent and infidelity later, your only recourse would be divorce. Unlike the fraudulent inducement available to challenge the sale of a car, you would not be able to sue for a rescission of the marriage contract upon the ground of fraudulent inducement for a misrepresentation of the intent to remain faithful.

However, in California, a party may be able to obtain an annulment in this situation under *In re Marriage of Ramirez*.¹ In *Ramirez*, the husband was carrying on relations with his wife's sister prior to the marriage.² The affair between the husband and sister continued after the marriage.³ Subsequently, Jorge (husband) was overheard stating to the sister that he loved her and "they would be together once he got his share of money and property from Lilia [the wife], and told her that he had only married Lilia to gain permanent residence status."⁴ The trial court "held that this kind of fraud goes to the heart of the marital relationship and declared the 2001 marriage void on the ground of fraud."⁵ The court of appeals affirmed the trial court's grant of an annulment based on Jorge's fraud.⁶

In California, "a marriage may only be annulled for fraud if the fraud relates to a matter which the State deems vital to the marriage relationship, or where the fraud goes to the very essence of the marriage relation."⁷ In *Ramirez* there was obvious fraud.⁸ However, the issue in *Ramirez* was whether this type of fraud based on fidelity goes to the very

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¹ *In re Marriage of Ramirez*, 81 Cal. Rptr. 3d 180, 186 (Cal. Ct. App. 2008) ("Jorge [husband] purposely deceived Lilia [wife] into thinking that he would perform one of the central obligations of the marriage contract—the obligation of fidelity. . . . Jorge committed fraud and Lilia is entitled to a judgment of annulment.").

² *Id.* at 181-82.

³ *Id.* at 182.

⁴ *Id.*

⁵ *Id.* at 183.

⁶ *In re Marriage of Ramirez*, 81 Cal. Rptr. 3d 180, 186 (Cal. Ct. App. 2008).

⁷ 4 AM. JUR. 2d *Annulment of Marriage* § 11 (2013) (citing *In re Marriage of Meagher and Maleki*, 31 Cal. Rptr. 3d 663 (Cal. Ct. App. 2005); *Blair v. Blair*, 147 S.W.3d 882 (Mo. Ct. App. 2004)).

⁸ See *Ramirez*, 81 Cal. Rptr. 3d at 183 (stating that "the fraud related to Jorge's marrying Lilia while carrying on a sexual relationship with Blanca which he intended to maintain").

essence of the marriage relation.⁹ Despite the California Court of Appeal's holding,¹⁰ the theory of annulment by fraud based on fidelity may have some hurdles to overcome before it is widely accepted. The *Ramirez* opinion could lead a reader to suspect that the court's decision is results-based and not legally sound. Moreover, the decision could create a fear about what effect it will have on family law.¹¹

The unique and colorful facts that led to the *Ramirez* decision could result in the holding being dismissed as result-based.¹² In particular, a considerable amount of money was at stake because the wife and husband possessed a total of eight properties.¹³ In addition, the wife was a sympathetic party due to the husband cheating on her with her sister prior to and after the marriage.¹⁴ Above all, the case involves the shocking admission by the husband that, at the time he entered into the marriage, he was having sexual relations with the wife's sister and he intended to continue his relations with the sister after the marriage.¹⁵ Moreover, after the husband and wife decided to end their marriage, the wife offered the husband one property from her real estate holdings in an attempt to negotiate a settlement.¹⁶ The husband refused, and the couple went to court.¹⁷ In the proceedings, the court granted the wife an annulment, and only the wife was found to be a putative spouse for the purpose of subsequent property division.¹⁸

Another hurdle the *Ramirez* holding may have to overcome before it gains acceptance is the fear about what effect it will have on marriage. *Ramirez* expanded the grounds for annulment to a new area: fraud based

⁹ *Id.* at 184 (citing *Maleki*, 31 Cal. Rptr. 3d at 664) ("A marriage may be annulled for fraud only in an extreme case where the particular fraud goes to the very essence of the marriage relation."); see *Maleki*, 31 Cal. Rptr. 3d at 664 (quoting *Marshall v. Marshall*, 300 P. 816, 817 (Cal. 1931) (stating that "[t]he law in California has long been that an annulment of marriage may be granted on the basis of fraud only 'in an extreme case where the particular fraud goes to the very essence of the marriage relation.'")).

¹⁰ *Ramirez*, 81 Cal. Rptr. 3d at 186.

¹¹ See *In re Marriage of Ramirez*, 81 Cal. Rptr. 3d 180, 186 (Cal. Ct. App. 2008) (Gaut, J., concurring, in part, dissenting in part) (stating that "[a]nnulment should be the exception, not the rule" and this decision "could have unintended repercussions in family law practice, leading to unnecessary litigation over title to property acquired by spouses during marriage which may not be considered community property if the marriage is deemed a nullity").

¹² *Id.* at 182-83.

¹³ *Id.* at 182 (stating the wife and husband had worked together in a realty business during their marriage and the wife's proposed settlement agreement listed five parcels of real property as community property and three as the wife's separate property).

¹⁴ See *id.*

¹⁵ *Ramirez*, 81 Cal. Rptr. 3d at 183.

¹⁶ *In re Marriage of Ramirez*, 81 Cal. Rptr. 3d 180, 182 (Cal. Ct. App. 2008).

¹⁷ *Id.*

¹⁸ *Id.* at 183.

on fidelity.¹⁹ Expanding the grounds for an annulment may undermine marriage and complicate or reduce the number of dissolution proceedings.²⁰ The dissent in *Ramirez* carefully pointed to this concern stating that “[a]nnulment should be the exception, not the rule.”²¹ Despite these hurdles, *Ramirez* was correctly decided and is not an example of results-driven adjudication. The legal basis underlying *Ramirez*—fraud based on fidelity—should be codified in the California Family Code so that it will be embraced by the judiciary, and its effect on marriage can be limited.

This Article will argue that fraud based on fidelity was properly promulgated in *Ramirez*.²² Part I of this Article offers background on the basis of the *Ramirez* decision, fraud based on fidelity. Part II of this Article shows that fraud based on fidelity is a proper basis for an annulment by fraud. Part III identifies fidelity as an express term in the marriage contract and argue that a fraud based on fidelity should go to the essence of the marriage. Part IV discusses how the *Ramirez* decision promotes the State’s interest in marriage. Part V shows that the *Ramirez* decision will not create a floodgate of fraud based on fidelity claims, nor will the decision create a burden on the courts. This Article concludes by recommending legislative action and judicial acceptance of fraud based on fidelity.

¹⁹ See *id.* at 185-86; see also *id.* at 186 (Gaut, J., concurring, in part, dissenting, in part) (noting that the majority relied on a case, *Sec.-First Nat’l Bank of L.A. v. Schaub*, 162 P.2d 966 (Cal. Dist. Ct. App. 1945), that had never before been used to support “the proposition that the infidelity of a spouse, without more, constitutes a fraud which justifies an annulment”).

²⁰ Allowing more marriages to be annulled may depreciate the value, sanctity, and seriousness of the marriage commitment. See *Mayer v. Mayer*, 279 P. 783, 784, 788 (Cal. 1929) (refusing to grant an annulment based on fraud wherein the husband and wife married after knowing each other for only twenty days, and stating that “[t]he evidence shows that the parties to this action voluntarily entered into the marriage state unadvisedly and lightly”). Moreover, an expansion of annulment grounds could turn dissolution proceedings into annulment proceedings. See *Ramirez*, 81 Cal. Rptr. 3d at 186 (Gaut, J., concurring, in part, dissenting, in part) (stating that the court’s decision to expand annulment grounds “could have unintended repercussions in family law practice, leading to unnecessary litigation over title to property acquired by spouses during marriage which may not be considered community property if the marriage is deemed a nullity”). Additionally, an annulment of marriage forces the court to create a burdensome legal fiction that states the marriage never happened even though the parties may have lived together for years, bought property together, and had children. See CAL. FAM. CODE § 2212(a) (Westlaw 2013) (stating that “[t]he effect of a judgment of nullity of marriage is to restore the parties to the status of unmarried persons”). Finally, increased annulments may frustrate California’s community property presumption by burdening courts with the task of determining how to allocate property that would normally be community property. See CAL. FAM. CODE § 760 (Westlaw 2013).

²¹ *In re Marriage of Ramirez*, 81 Cal. Rptr. 3d 180, 186 (Cal. Ct. App. 2008) (Gaut, J., concurring, in part, dissenting, in part).

²² *Id.* at 186.

I. *RAMIREZ* WAS PROPERLY DECIDED BECAUSE THERE WAS A FRAUD
BASED ON FIDELITY—A MATTER THAT IS ESSENTIAL TO MARRIAGE

The *Ramirez* decision extended the grounds for annulment to a new area when it granted an annulment for a fraud based on fidelity.²³ In California, an annulment by fraud must relate to a matter that goes to the very essence of the marriage relation.²⁴ However, there is no legislative list detailing what matters go to the essence of the marriage relation. One way to identify what matters go to the essence of the marriage relation is to look at the traditional, case law grounds for annulment by fraud.²⁵ The California courts have traditionally found annulment by fraud in three areas: consummation, reproduction, and antenuptial pregnancy.²⁶ In reviewing these traditional grounds for annulment by fraud, it is apparent that fidelity should also be deemed a matter that goes to the essence of the marital relation.

²³ See *id.* at 185-86; see also *id.* at 186 (Gaut, J., concurring, in part, dissenting, in part) (noting that the majority relied on a case, *Sec.-First Nat'l Bank of L.A. v. Schaub*, 162 P.2d 966 (Cal. Dist. Ct. App. 1945), that had never before been used to support "the proposition that the infidelity of a spouse, without more, constitutes a fraud which justifies an annulment").

²⁴ *In re Marriage of Meagher and Maleki*, 31 Cal. Rptr. 3d 663, 664 (Cal. Ct. App. 2005) (quoting *Marshall v. Marshall*, 300 P. 816, 817 (Cal. 1931)) (stating that "[t]he law in California has long been that an annulment of marriage may be granted on the basis of fraud only 'in an extreme case where the particular fraud goes to the very essence of the marriage relation'").

²⁵ Laurence Drew Borten, *Sex, Procreation, and the State Interest In Marriage*, 102 COLUM. L. REV. 1089, 1096-97 (2002).

²⁶ See *Maleki*, 31 Cal. Rptr. 3d at 667 (stating that "annulments on the basis of fraud are generally granted only in cases where the fraud related in some way to the sexual or procreative aspects of marriage"); see also *In re Marriage of Nillo*, No. B201031, 2008 WL 5123955, *4 (Cal. Ct. App. 2008) (citations omitted) ("Fraud sufficient to support an annulment has been found when a prospective spouse concealed his or her intention not to: (1) engage in sexual relations with the other spouse (*In re Marriage of Liu*, 197 Cal. App. 3d 143, 156 (Cal. Ct. App. 1987); (2) live in the same house with the other spouse (*Handley v. Handley*, 179 Cal. App. 2d 742, 747-48 (Cal. Dist. Ct. App. 1960); (3) terminate an intimate relationship with a third person after the marriage (*In re Marriage of Ramirez*, 165 Cal. App. 4th 751, 759 (Cal. Ct. App. 2008); *Sec.-First Nat'l Bank of L.A. v. Schaub*, 71 Cal. App. 2d 467, 477-79 (Cal. Dist. Ct. App. (1945)); or (4) have children with the other spouse notwithstanding a promise to the contrary (*Maslow v. Maslow*, 117 Cal. App. 2d 237 (Cal. Dist. Ct. App. 1953), disapproved on other grounds by *Liodas v. Sahadi*, 19 Cal. 3d 278, 287 (Cal. 1977). Annulments have also been justified based on a spouse's concealment of his or her sterility (*Vileta v. Vileta*, 53 Cal. App. 2d 794 (Cal. Dist. Ct. App. 1942)) and a wife's concealment at the time of marriage that she was pregnant with another man's child. (*Hardesty v. Hardesty*, 193 Cal. 330 (Cal. 1924).").

A. TRADITIONALLY, AN ANNULMENT IS PROPER WHERE THERE IS
FRAUD BASED ON INTENT OR ABILITY TO REPRODUCE,
CONSUMMATION, OR IN CERTAIN CASES OF ANTENUPTIAL
PREGNANCY

Reproduction is a matter that is at the essence of the marriage relation.²⁷ California courts grant annulments for fraud after a party has made a fraudulent representation about their ability²⁸ or desire to have children.²⁹ If a fraudulent representation of an intent to reproduce is a ground for fraud, then reproduction must be at the very essence of marriage.³⁰ Reproduction involves sex, and thereby, sex is in some way at the very essence of a marriage contract.³¹ Thus, frauds relating to sex are a proper ground for an action for annulment by fraud in California.³²

An unconsummated marriage may also be annulled if there is a fraud based on the intent³³ or ability³⁴ to consummate the marriage.

²⁷ *Aufort v. Aufort*, 49 P.2d 620, 621 (Cal. Dist. Ct. App. 1935) (declaring that “the procreation of children is the most important end of matrimony”).

²⁸ *See id.* at 620-21 (granting an annulment for fraud upon the ability to procreate where the wife concealed that prior to marriage she had been sterilized at the Sonoma State Hospital while committed as a “feeble-minded person”).

²⁹ *See Maslow*, 255 P.2d at 68 (stating that “[a] promise by one spouse before the marriage, express or implied, to have children, without any intention to keep the promise, is a sufficient fraud to void the marriage”).

³⁰ *See Aufort*, 49 P.2d at 621 (stating that “the procreation of children is the most important end of matrimony”).

³¹ *See In re Marriage of Meagher & Maleki*, 31 Cal. Rptr. 3d 663, 667 (Cal. Ct. App. 2005) (“As these cases illustrate, annulments on the basis of fraud are generally granted only in cases where the fraud related in some way to the sexual or procreative aspects of marriage.”).

³² *See Borten supra* note 25, at 1096-97 (noting that sex and procreation are “recurring themes” in frauds found by courts that go to the essence of marriage).

³³ *Millar v. Millar*, 167 P. 394, 397 (Cal. 1917) (granting an annulment where the wife at the time of the marriage did not intend to have sexual relations with the husband); *In re the Marriage of Liu*, 242 Cal. Rptr. 649, 651, 657 (Cal. Ct. App. 1987) (affirming an annulment after the trial court found that the wife entered into the marriage “for the purpose of obtaining a ‘green card’” and she “did not intend to engage in sexual relations”); *Lamberti v. Lamberti*, 77 Cal. Rptr. 430, 484, 486 (Cal. Ct. App. 1969) (granting an annulment where the husband married the wife in order “to acquire an advantageous alien status” but never consummated the marriage or cohabitated with his wife); *Rathburn v. Rathburn*, 292 P.2d 274, 277 (Cal. Dist. Ct. App. 1956) (“The weight of authority is to the effect that if one of the parties to a marriage goes through the ceremony with an intention not to consummate the marriage by marital intercourse, and persists in such intention, an annulment will be granted upon application of the other party on the ground of fraud.”); *Wiley v. Wiley*, 139 P.2d 950, 951 (Cal. Dist. Ct. App. 1943) (granting an annulment where the wife concealed from the husband her intent to refuse intercourse without cause).

³⁴ *Stepanek v. Stepanek*, 14 Cal. Rptr. 793, 794 (Cal. Dist. Ct. App. 1961) (quoting CAL. CIV. CODE § 82(6), codified at CAL. FAM. CODE § 2210(f) (Westlaw 2013)) (stating that “a marriage may be annulled, if at the time of marriage, either party was physically incapable of entering into the marriage state, and such incapacity continues, and appears to be incurable”); *Putman v. Putman*, 254 P.2d 589, 590 (Cal. Dist. Ct. App. 1953) (granting an annulment where it was proven that wife had

Some states require the consummation to be physically impossible, and the spouse seeking annulment must be unaware of the impossibility of consummation.³⁵ Other states allow a marriage to be annulled for lack of consummation if one party secretly never intended to consummate the marriage.³⁶ In order to grant this type of annulment, courts have held that consummation of the marriage is at the very essence of a marriage³⁷ and, accordingly, is a duty and obligation under the marital contract.³⁸ As a result of the many fraud based on consummation cases, a strong argument can be made that, through the eyes of the court, sex is at the very essence of the marriage contract.³⁹

An annulment for antenuptial pregnancy is proper in limited situations where there is fraud. An annulment can be granted where the woman is pregnant prior to the marriage ceremony by a man other than her husband.⁴⁰ Some courts have not allowed an annulment when the wife is pregnant with another man's child prior to marriage, and the husband and wife were engaging in premarital sex with each other.⁴¹ The courts may be indicating that the husband was on notice of the wife's tendency to engage in premarital sex, and thus, when she indeed is pregnant via another man, there is no fraud-like basis for an annulment.⁴²

the "physical incapacity to enter into the marital state" and there was "fraud on her part inducing [the husband] to enter into the marriage").

³⁵ See *Manbeck v. Manbeck*, 489 A.2d 748, 750-51 (Pa. Super. Ct. 1985); UNIF. MARRIAGE AND DIVORCE ACT § 208(a)(2) (Westlaw 2011); 4 AM. JUR. 2d, *Annulment of Marriage* § 26 (2013); 55 C.J.S. *Marriage* § 16 (2013); *Kshaiboon v. Kshaiboon*, 652 S.W.2d 219 (Mo. Ct. App. 1983) ("[T]he defendant lacked the physical or mental capability to engage in a normal sexual relationship with plaintiff The evidence also supports a valid inference that this condition was known to defendant prior to marriage and that he concealed such fact from plaintiff.").

³⁶ See *In re Marriage of Naguit*, 433 N.E.2d 296, 304 (Ill. App. Ct. 1982).

³⁷ See *Rathburn*, 292 P.2d at 573-74.

³⁸ *Millar v. Millar*, 167 P. 394, 396 (Cal. 1917).

³⁹ See *Borten supra* note 25, at 1100 ("Courts will most reliably grant an annulment for fraud when the substance of the fraud is one that affects the potential of the married couple to have a sexual relationship.").

⁴⁰ See *Baker v. Baker* 13 Cal. 87, 105-06 (Cal. 1859); *Handley v. Handley*, 3 Cal. Rptr. 910, 913 (Cal. Dist. Ct. App. 1960) (stating that California courts permit an annulment based on the wife's concealment from the husband that "at the time of their marriage she was pregnant by another man"); *Sec.-First Nat'l Bank of L.A. v. Schaub*, 162 P.2d 966, 972 (Cal. Dist. Ct. App. 1945) ("[C]oncealment of pregnancy by a man other than the intended husband is a good ground for annulment."). See also *Marriage - Nullification - Concealment of Antenuptial Pregnancy Where Husband Himself Also Had Illicit Premarital Relations with Wife*, 42 HARV. L. REV. 1081, 1081-82 (1929).

⁴¹ *Marriage - Nullification - Concealment of Antenuptial Pregnancy, supra* note 40, at 1081-82.

⁴² See *Baker*, 13 Cal. at 105-06 ("The point decided is, that where the husband at the marriage knows that his intended wife is lewd, he is not entitled to a divorce upon the subsequent birth of a child begotten previously."); see also *Marriage - Nullification - Concealment of Antenuptial Pregnancy, supra* note 40, at 1081-82.

Accordingly, courts allow annulments based on an antenuptial pregnancy that involves fraud in a party's representations regarding sex and fidelity.

B. FIDELITY IS A SEXUAL MATTER, AND, AS SUCH, IT IS ESSENTIAL TO MARRIAGE

Fraud based on fidelity is a proper ground for an annulment because it is closely related to traditional and well-accepted grounds for annulments by fraud.⁴³ In California, an annulment by fraud must relate to a matter that goes to the very essence of the marriage relation.⁴⁴ Consummation and reproduction are two well-accepted matters that have been held to be at the very essence of the marriage relation.⁴⁵ Consummation, reproduction, and fidelity all deal with sexual relations. As a result, extending annulment by fraud to a fraud based on fidelity is reasonable, because it is arbitrary to draw a line that recognizes two types of sexually related frauds but excludes a third type of sexually related fraud. Furthermore, an annulment for antenuptial pregnancy deals with a fraud-like situation involving sex and an expectation of premarital fidelity.⁴⁶ Consequently, an annulment for antenuptial pregnancy is very similar to fraud based on fidelity. Thus, as a result of case law, it is not illogical to hold that fidelity as a sexual matter is at the essence of marriage and a fraud upon fidelity is a proper ground for an annulment.

Accordingly, *Ramirez* was correctly decided because the fraud in *Ramirez* relates to sex.⁴⁷ In *Ramirez*, the fraud was the misrepresentation of the husband's intent to remain faithful at the time the marriage contract was entered into.⁴⁸ But for the husband's false promise to be faithful, the wife would not have married him. The fraud in the

⁴³ *In re Marriage of Ramirez*, 81 Cal. Rptr. 3d 180, 186 (Cal. Ct. App. 2008) (fraud based on fidelity). See also *Baker*, 13 Cal. at 105-06 (antenuptial pregnancy); *Rathburn v. Rathburn*, 292 P.2d 274, 277 (Cal. Dist. Ct. App. 1956) (secret intent to not consummate); *Aufort v. Aufort*, 49 P.2d 620, 620 (Cal. Dist. Ct. App. 1935) (concealment of infertility).

⁴⁴ *In re Marriage of Meagher and Maleki*, 31 Cal. Rptr. 3d 663, 664 (Cal. Ct. App. 2005).

⁴⁵ *Rathburn*, 292 P.2d at 277 (stating a fraud upon consummation was a fraud where the promise related "to a material matter"); *Maslow v. Maslow*, 255 P.2d 65, 68 (Cal. Dist. Ct. App. 1953) ("One of the prime purposes of matrimony, by the laws of nature and society, is procreation.").

⁴⁶ See *Baker v. Baker* 13 Cal. 87, 105-06 (Cal. 1859); see also *Marriage - Nullification - Concealment of Antenuptial Pregnancy*, *supra* note 40, at 1081-82.

⁴⁷ *Ramirez*, 81 Cal. Rptr. 3d at 185 ("Here, the trial court specifically found that the fraud was unrelated to the husband's efforts to obtain permanent legal status. Instead, it found the fraud was based on Jorge's intent to continue the ongoing simultaneous sexual relationships with Lilia and Blanca at the time that he and Lilia entered into the 2001 marriage.").

⁴⁸ See *In re Marriage of Ramirez*, 81 Cal. Rptr. 3d 180, 183 (Cal. Ct. App. 2008).

inducement is obvious, and fidelity as a sexual matter goes to the heart of the marriage⁴⁹ just like the sexual frauds in consummation, reproduction, and antenuptial pregnancy.⁵⁰

II. FIDELITY IS AN EXPRESS TERM IN THE MARRIAGE CONTRACT AND, THUS, A FRAUD BASED ON FIDELITY GOES TO THE ESSENCE OF THE MARRIAGE

A fraud based on fidelity goes to the essence of a marriage contract because it is an express term in a marriage contract.⁵¹ Furthermore, fraud based on fidelity should be a basis for an annulment because fidelity is codified as a duty in the California Family Code.⁵² Additionally, fidelity is frequently mentioned in marriage vows and is a normal expectation in marriage.⁵³ Furthermore, consummation and reproduction have been held to be implied terms of a marriage contract,⁵⁴ and a fraud upon those implied terms has been held to go to the essence of the marriage.⁵⁵ If an implied term is enough to be a basis for fraud going to the essence of the marriage, then a fraud upon an express term should also go to the essence of the marriage.

A. FIDELITY IS A DUTY IMPOSED IN MARRIAGE UNDER THE CALIFORNIA FAMILY CODE AND A PROVISION OF THE CIVIL CONTRACT BETWEEN SPOUSES

Fidelity is essential to marriage because it is an express term in a marriage contract.⁵⁶ Section 720 of the California Family Code states, “[h]usband and wife contract toward each other obligations of mutual

⁴⁹ See *id.*

⁵⁰ See *supra* notes 27-42 and accompanying text.

⁵¹ CAL. FAM. CODE § 720 (Westlaw 2013) (“Husband and wife contract toward each other obligations of mutual respect, fidelity, and support.”).

⁵² *Id.*

⁵³ See Melanie Henson, *Traditional Wedding Vows*, ONE HEART WEDDINGS, www.weddingclipart.com/guide/wedding-vows/Traditional-Wedding-Vows.html (last visited May 1, 2013) (providing information regarding traditional, nondenominational wedding vows which may include a vow to forsake all others and be faithful only to the husband or wife as long as both spouses live).

⁵⁴ See *Maslow v. Maslow*, 255 P.2d 65, 68 (Cal. Dist. Ct. App. 1953) (citing *Millar v. Millar*, 175 Cal. 797, 803 (Cal. 1917)) (stating that there is an implied promise in the marriage contract to have “normal and natural marital relations” and to abstain from “anything which will frustrate the normal and natural result of those relations”).

⁵⁵ *Rathburn v. Rathburn*, 292 P.2d 274, 277 (Cal. Dist. Ct. App. 1956); *Maslow*, 255 P.2d at 68.

⁵⁶ CAL. FAM. CODE § 720 (Westlaw 2013).

respect, *fidelity*, and support.”⁵⁷ As an express term in the marriage contract, a fraud based on fidelity should go to the essence of the marriage because a fraud based on an express term “directly defeats the marriage relationship.”⁵⁸

Within traditional vows, the husband and wife promise to be faithful.⁵⁹ Traditional wedding vows generally include a question of intent:

[Name], do you take [Name] to be your wedded [husband/wife] to live together in marriage. Do you promise to love, comfort, honor and keep [him/her] For better or worse, for richer or poorer, in sickness and in health. And forsaking all others, be faithful only to [him/her] so long as you both shall live?⁶⁰

Within these vows is an express promise of fidelity.⁶¹ Marriage is a contract between the husband and wife,⁶² and within that civil contract the parties have made an express promise to be faithful.⁶³ That promise is an inherent and defining characteristic of the marital relationship that, arguably, differentiates it from other intimate relationships.

Accordingly, a party that knowingly intends to be unfaithful, but still says “I do” after a question of intent, is committing a fraud upon an express term of the private civil contract. An express term in the contract should be a proper basis upon which fraud in the inducement. Unfortunately, case law has rarely recognized that fraud can be committed upon fidelity.⁶⁴

⁵⁷ *Id.* (emphasis added).

⁵⁸ *In re Marriage of Ramirez*, 81 Cal. Rptr. 3d 180, 184 (Cal. Ct. App. 2008).

⁵⁹ *See* Henson, *supra* note 53.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Sec.-First Nat'l Bank of L.A. v. Schaub*, 162 P.2d 966, 970 (Cal. Dist. Ct. App. 1945) (stating that “[t]he marriage in itself was a contract under which each of the parties undertook the obligations of mutual respect, fidelity and support”).

⁶³ *Id.* (“The agreement to marry was a representation that the obligations of marriage would be faithfully kept.”).

⁶⁴ *See* *Radochonski v. Radochonski*, No. 21050-9-II, 1998 WL 267062, *2 (Wash. Ct. App. 1998) (“[P]remarital chastity, false representations as to love and affection, misrepresentation of affection, failure to disclose out-of-wedlock children, fraudulent representation of pregnancy, and failure to end a previous relationship have all been held not to go to the essentials of marriage.”).

B. CALIFORNIA COURTS ALLOW ANNULMENT BY FRAUD UPON IMPLIED TERMS, THUS, A FRAUD UPON AN EXPRESS TERM SHOULD ALSO BE ALLOWED

Traditionally, courts have only granted an annulment when fraud is committed upon consummation and reproduction,⁶⁵ terms that courts have held to be implied in the marriage contract.⁶⁶ Despite only being implied terms, courts have held that reproduction is so inherent in the purpose of marriage that entering into a marriage without the intent to have children is a fraud that goes to the essence of the marriage contract.⁶⁷

If a fraud upon an implied term in a marriage contract is a proper ground for an annulment then a fraud upon an express term, such as fidelity, should also be a ground for an annulment. Moreover, a fraud based on fidelity, more often than not, involves an active misrepresentation, unlike the implied terms of consummation and reproduction that only require an omission.

C. CALIFORNIA COURTS HAVE GRANTED AN ANNULMENT FOR FRAUD IN A FACTUALLY SIMILAR CASE WHILE RECOGNIZING THAT FIDELITY IS PART OF THE MARRIAGE CONTRACT

The underlying fraud and holding in *Ramirez* is not entirely new to California law. In *Security-First National Bank of Los Angeles v. Schaub*, the court granted an annulment to a husband's estate in a very similar factual context.⁶⁸ In *Schaub*, the wife Ellen, and her boyfriend Scott, entered into a pre-marriage scheme to defraud the husband Amiel of his property.⁶⁹ As in *Ramirez*, Ellen and Scott also continued a sexual relationship after Ellen married Amiel.⁷⁰ “The court found that defendant [Ellen] had an agreement with Scott that she would marry

⁶⁵ See *In re Marriage of Meagher and Maleki*, 31 Cal. Rptr. 3d 663, 667 (Cal. Ct. App. 2005) (stating that “annulments on the basis of fraud are generally granted only in cases where the fraud related in some way to the sexual or procreative aspects of marriage”); see also *In re Marriage of Nillo*, No. B201031, 2008 WL 5123955, *4 (Cal. Ct. App. 2008).

⁶⁶ *Rathburn v. Rathburn*, 292 P.2d 274, 277 (Cal. Dist. Ct. App. 1956); *Maslow v. Maslow*, 255 P.2d 65, 68 (Cal. Dist. Ct. App. 1953).

⁶⁷ *Aufort v. Aufort*, 49 P.2d 620, 621 (Cal. Dist. Ct. App. 1935) (granting an annulment stating that “procreation of children is the most important end of matrimony”); see also *Handley v. Handley*, 3 Cal. Rptr. 910, 913 (Cal. Dist. Ct. App. 1960) (noting that a marriage may be annulled when “the known fact of sterility [is] concealed from the other spouse at the time of marriage”).

⁶⁸ *Sec.-First Nat'l Bank of L.A. v. Schaub*, 162 P.2d 966, 967-70 (Cal. Dist. Ct. App. 1945).

⁶⁹ *Id.* at 972.

⁷⁰ *Id.*

plaintiff, procure an interest in his property, and that she and Scott would continue their intimacies and sexual relations which had existed between them for some time prior to the inauguration of their plan.”⁷¹ In addition, like the parties in *Ramirez*, Ellen made an actual admission that she married Amiel “to get some of his property.”⁷² The husband and wife in *Schaub* also testified that the marriage had been consummated⁷³ more than a year had passed before the fraud was discovered.⁷⁴

Not only is *Schaub* factually similar to *Ramirez*, the court in *Schaub* recognized fidelity as a term in the marriage contract and granted an annulment for a fraud upon it.⁷⁵ Like *Ramirez*, the fraud in *Schaub* was obvious.⁷⁶ In addition, the *Schaub* court was limited by the essence of the marriage relations test.⁷⁷ Despite the essence of the marriage relations limitation, the court still granted an annulment after finding a fraud was committed upon the obligations of the marriage contract.⁷⁸ The court stated that the marriage was a contract upon which “the parties undertook the obligations of mutual respect, *fidelity* and support.”⁷⁹ In *Schaub*, the court recognized the express terms of the marriage contract⁸⁰ and found that a “grievous” fraud upon them is sufficient to invalidate the marriage.⁸¹

However, the *Ramirez* dissent convincingly distinguishes *Schaub* from the facts before it.⁸² Although Jorge, the husband in *Ramirez*, made a statement about his subjective intent that was similar to Ellen’s statement, the trial court did not believe that Jorge’s statements were true.⁸³ “The [trial] court found that Jorge did not marry Lilia because he was worried about his immigration or work status; instead, the court

⁷¹ *Id.*

⁷² *Id.* at 969-70.

⁷³ Sec.-First Nat’l Bank of L.A. v. *Schaub*, 162 P.2d 966, 968-69 (Cal. Dist. Ct. App. 1945). With both parties admitting consummation of the marriage the court could not grant an annulment on a more traditional ground. See *supra* notes 27-42 and accompanying text.

⁷⁴ *In re Marriage of Ramirez*, 81 Cal. Rptr. 3d 180, 182 (Cal. Ct. App. 2008) (married three years); *Schaub*, 162 P.2d at 969 (married nearly two years).

⁷⁵ *Schaub*, 162 P.2d at 971-73.

⁷⁶ *Id.* at 972.

⁷⁷ *Id.* (citing, e.g., *Marshall v. Marshall*, 212 Cal. 736 (Cal. 1931)).

⁷⁸ Sec.-First Nat’l Bank of L.A. v. *Schaub*, 162 P.2d 966, 971-73 (Cal. Dist. Ct. App. 1945).

⁷⁹ *Id.* at 970 (emphasis added) (citing CAL. CIV. CODE, §155 (codified at CAL. FAM. CODE § 720 (Westlaw 2013))).

⁸⁰ *Id.*

⁸¹ *Id.* at 971-72 (“Equity will not deny relief where a plan of deceit has been laid out and consummated which must inevitably defeat the essential purposes of the deceived party in entering into the relationship. Such deceit goes directly to the validity of the contract.”).

⁸² *In re Marriage of Ramirez*, 81 Cal. Rptr. 3d 180, 186 (Cal. Ct. App. 2008).

⁸³ *Id.* at 183.

found Jorge made false statements to Blanca [the sister] about his reasons for marrying Lilia, including a need for a green card to string [Blanca] along and to delay having to make a commitment to her.”⁸⁴ Therefore, *Ramirez* is unlike *Schaub* because *Schaub* can be read as an annulment granted for infidelity of a spouse plus a scheme to defraud,⁸⁵ while the fraud in *Ramirez* only related to Jorge “carrying on a sexual relationship with [the sister] which he intended to maintain.”⁸⁶ In this way, the *Ramirez* court has actually expanded the grounds for annulment, because it sanctions an annulment for a simple fraud based on fidelity instead of a scheme to defraud plus infidelity.

III. THE *RAMIREZ* DECISION PROMOTES THE STATE’S INTEREST IN MARRIAGE

The California Supreme Court has held that society’s interest in marriage commences with consummation, and the State’s interest in marriage is due to public policy considerations.⁸⁷ Unfortunately, the public policy considerations that create the State’s interest are unclear.⁸⁸ Moreover, the definition of marriage, as defined by policy considerations, are in flux in California and in other states.⁸⁹ Despite the changing definition and unclear public policy, *Ramirez* is wholly in accord with the State’s interest in promoting the stability of the family unit, discouragement of extramarital sex, and promoting the sanctity of marriage.⁹⁰ *Ramirez* also furthers the State’s longstanding interest in protecting its citizens from fraud.⁹¹

⁸⁴ *Id.*

⁸⁵ *Sec.-First Nat’l Bank of L.A. v. Schaub*, 162 P.2d 966, 970-72 (Cal. Dist. Ct. App. 1945).

⁸⁶ *Ramirez*, 81 Cal. Rptr. 3d at 183.

⁸⁷ *See* *Millar v. Millar*, 167 P. 394, 396 (Cal. 1917).

⁸⁸ *See* Borten *supra* note 25, at 1123 (“But now and in the past, when courts and commentators have seen fit to enumerate society’s interests in marriage, the answer has often been expressed in the vaguest terms.”).

⁸⁹ *See* Lisa Leff, *Proposition 8: Historian Testifies Marriage About More Than Procreation*, HUFFINGTON POST, (Jan. 12, 2010, 08:55 PM), www.huffingtonpost.com/2010/01/12/proposition-8-historian-t_n_420367.html; *see also* Jesse McKinley, *Personal Focus as Same-Sex-Marriage Trial Opens in California*, N.Y. TIMES (Jan. 11, 2010), www.nytimes.com/2010/01/12/us/12prop8.html?_r=0.

⁹⁰ *See* Borten *supra* note 25, at 1114-15.

⁹¹ *See* *Spiritual Psychic Sci. Church v. City of Azusa*, 703 P.2d 1119, 1127 (Cal. 1985), *disapproved on other grounds by* *Kasky v. Nike, Inc.*, 45 P.3d 243, 261 (Cal. 2002); *Valov v. Dep’t of Motor Vehicles*, 34 Cal. Rptr. 3d 174, 185 (Cal. Ct. App. 2005).

A. *RAMIREZ* PROMOTES THE STABILITY OF THE FAMILY UNIT,
DISCOURAGES EXTRAMARITAL SEX, AND UPHOLDS THE SANCTITY
OF MARRIAGE

The State's interest in regulating marriage is to protect the stability of the biological family unit, limit extramarital sex, and promote the sanctity of marriage. *Ramirez* is in accord with those policy considerations.⁹² The *Ramirez* decision promotes the stability of the family unit because it discourages pre-planned extramarital affairs that would weaken it.⁹³ The *Ramirez* decision acts as a deterrent to parties that seek to enter into a marriage contract while planning to begin or continue an extramarital affair. The State also wants to discourage extramarital sex because it does not want to support illegitimate children.⁹⁴ The *Ramirez* decision discourages pre-planned extramarital affairs,⁹⁵ therefore, it also has the effect of preventing illegitimate children that might be produced by the pre-planned affair. In addition, *Ramirez* promotes the sanctity of marriage by not recognizing the marriages of those who fraudulently induce others to enter into the marital contract.⁹⁶ In this manner, *Ramirez* prevents parties from using marriage as a tool for financial gain by providing an annulment for those who are victims of fraud.

On the other hand, the impact of *Ramirez* is likely to be minimal, because not many citizens know about the *Ramirez* decision. In addition, a party that is sophisticated enough to know about the *Ramirez* decision is also likely to be sophisticated enough to not state their subjective intent to commit fraud.⁹⁷ As a result, the *Ramirez* decision works more like a penalty rather than a deterrent. *Ramirez* only operates as a way to punish the offending spouse after the fraud based on fidelity, by not offering the protections of marriage to the culpable party.

⁹² *In re Marriage Cases*, 76 Cal. Rptr. 3d 683, 739 (Cal. 2008) (stating that "the state undeniably has a legitimate interest in promoting 'responsible procreation'"); *Elden v. Sheldon*, 46 Cal. 3d 267, 274-75 (Cal. 1988). See Borten *supra* note 25, at 1114-15; Lynn D. Wardle, "Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation, 24 HARV. J.L. & PUB. POL'Y 771, 778 (2001) (noting that "the social purposes of marriage" include "procreation, child rearing, channeling sexual behavior, and economic stability").

⁹³ See *In re Marriage of Ramirez*, 81 Cal. Rptr. 3d 180, 185-86 (Cal. Ct. App. 2008).

⁹⁴ See Borten *supra* note 25, at 1115.

⁹⁵ *In re Marriage of Ramirez*, 81 Cal. Rptr. 3d 180, 185-86 (Cal. Ct. App. 2008).

⁹⁶ See *id.* at 182 (discussing Jorge's expression of his intent to leave his wife after he got "his share" of the money and property).

⁹⁷ See *id.*

B. CALIFORNIA, LIKE ALL STATES, HAS A LONG-STANDING INTEREST IN PROTECTING CITIZENS FROM FRAUD

California has a long-standing interest in protecting its citizens from acts of fraud.⁹⁸ This interest includes protecting citizens from frauds that induce marriage.⁹⁹ “It is not in the public interest to protect . . . a marriage to the serious detriment of the defrauded party.”¹⁰⁰ Providing an annulment for fraud based on fidelity serves this important public policy, because an annulment protects innocent parties who unknowingly enter into a marriage with a predatory party that intends to commit fraud upon them.¹⁰¹

C. DUE TO THE CHANGES IN SOCIETAL ATTITUDES, CALIFORNIA’S INTEREST IN MARRIAGE HAS EVOLVED, THUS, MARRIAGE CONTRACTS SHOULD BE TREATED MORE LIKE OTHER CONTRACTS

Marriage contracts should be viewed in light of the societal changes that have altered the State’s interest in marriage because the purpose of marriage is no longer just procreation.¹⁰² In reality, reproduction is no longer the “essence of the marital relation.”¹⁰³ States allow same-sex marriages,¹⁰⁴ impotent parties have the right to marry,¹⁰⁵ and couples

⁹⁸ See *Spiritual Psychic Sci. Church v. City of Azusa*, 703 P.2d 1119, 1127 (Cal. 1985), *disapproved on other grounds by Kasky v. Nike, Inc.*, 45 P.3d 243, 261 (Cal. 2002); *Valov v. Dep’t of Motor Vehicles*, 34 Cal. Rptr. 3d 174, 185 (Cal. Ct. App. 2005) (declaring, “[n]or can it be seriously doubted that our state has a compelling interest in protecting its citizens against fraud and identity theft”).

⁹⁹ *In re Marriage of Meagher and Maleki*, 31 Cal. Rptr. 3d 663, 667 (Cal. Ct. App. 2005).

¹⁰⁰ *Wolfe v. Wolfe*, 389 N.E.2d 1143, 1145 (Ill. 1979) (granting an annulment for a fraud perpetuated by wife whereupon she misrepresented to husband that her previous husband had died in order to induce the second marriage in accord with the new husband’s Catholic beliefs); see also *Sec.-First Nat’l Bank of L.A. v. Schaub*, 162 P.2d 966, 971 (Cal. Dist. Ct. App. 1945) (“But where the fraud is so grievous that it places the injured party in a relationship that is intolerable because it cannot honorably be endured, it robs the contract of marriage of all validity.”).

¹⁰¹ See *In re Marriage of Ramirez*, 81 Cal. Rptr. 3d 180, 183 (Cal. Ct. App. 2008) (stating that the trial court held that “this kind of fraud goes to the heart of the marital relationship”); *Bragg v. Bragg*, 28 P.2d 1046, 1048 (Cal. 1934) (stating that a court will grant an annulment based on fraud when it “appear[s] that the defendant has made false statements upon matters which the state deems vital to the marriage relationship, or the evidence must be clear to the effect that the spouse against whom the annulment is sought . . . assumed the relation with the sole intent of obtaining fraudulently the property of the other, or with the intent of gaining thereby some advantage which inheres in the matrimonial state”).

¹⁰² See Borten *supra* note 25, at 1107-09; Leff, *supra* note 89; McKinley *supra* note 89.

¹⁰³ See Borten *supra* note 25, at 1097, 1107-09.

¹⁰⁴ See, e.g., N.Y. DOM. REL. LAW § 10-a(1) (McKinney 2013) (stating that “[a] marriage that is otherwise valid shall be valid regardless of whether the parties to the marriage are of the same or different sex”).

always have the choice to not reproduce.¹⁰⁶ Thus, without a procreation interest, the State's interest in marriage is limited to the protection of a stable biological unit, discouraging extramarital affairs, and promoting the sanctity of marriage.¹⁰⁷

As a result of the State's evolving interest, modern marriage contracts should be treated more like normal contracts. A California Supreme Court supported this view in 1917 where a marriage was induced by fraud:¹⁰⁸

In the case at bar the libelee went through the marriage ceremony with an intention never to perform any one of the duties of a wife. That plan she carried into effect. It is well settled that a contract for the sale of goods is induced by fraud, and for that reason voidable, where the purchaser had an intention when the contract was made not to perform his promise to pay for them. If an intention not to perform his promise renders a contract for purchase of property voidable, a fortiori the same result must follow in the case of a contract to enter into 'the holy estate of matrimony.'¹⁰⁹

The words of the 1917 California Supreme Court are even stronger today in light of the State's altered interest in regulating marriage. Marriage and the "essence of marriage" have blurred to the point where no one really knows what the essentials of marriage are anymore.¹¹⁰ Without an "essential" to a marriage contract, the contract's interpretation should be limited to traditional contract fundamentals which would include basic fraud and protect parties from fraud based on fidelity.

D. A FRAUD BASED ON FIDELITY IS A SERIOUS PROBLEM THAT NECESSITATES AN ANNULMENT

Allowing an annulment in an extreme case like *Ramirez* protects innocent parties who unknowingly enter into marriage with a predatory

¹⁰⁵ Borten *supra* note 25, at 1109-10.

¹⁰⁶ See *id.* at 1089. ("Today, the prevalence and widespread acceptance of extramarital sex and birth control, accompanied by heightened respect for reproductive privacy, have rendered anachronistic the conception of marriage as a regulator of sex. The societal interests that remain are only loosely linked to intercourse, if at all: enforcing support obligations and stabilizing family units.").

¹⁰⁷ *Id.* at 1127-28; *In re Marriage of Ramirez*, 81 Cal. Rptr. 3d 180, 186 (Cal. Ct. App. 2008).

¹⁰⁸ See *Millar v. Millar*, 167 P. 394, 396 (Cal. 1917).

¹⁰⁹ *Id.* at 397 (quoting *Cowles v. Cowles*, 112 Mass. 298 (Mass. 1873)).

¹¹⁰ See Borten *supra* note 25, at 1098, 1128.

party intending to commit fraud upon them.¹¹¹ Failing to recognize fraud in a *Ramirez*-type situation would grant the party that committed the fraud a windfall of community property interests that a marriage contract affords.¹¹²

Additionally, fraud based on fidelity is analogous to other grounds for annulment when evaluated for their degree of seriousness. The most serious grounds for annulment are incest,¹¹³ consent obtained by force,¹¹⁴ childhood marriage,¹¹⁵ and bigamy.¹¹⁶ A middle ground of seriousness could be fraudulent misrepresentation of desire¹¹⁷ or ability¹¹⁸ to reproduce, *fraud based on fidelity*,¹¹⁹ fraudulent refusal of sexual intercourse,¹²⁰ fraudulent intention not to live with a spouse,¹²¹ antenuptial pregnancy,¹²² inability to consummate,¹²³ inability to consent to marriage due to mental incapacity,¹²⁴ and prior existing marriage.¹²⁵ The least serious ground for an annulment is a marriage entered into under intoxication.¹²⁶ Fraudulent fidelity seems to fit in the middle of the spectrum for seriousness of annulment law, and thus, qualifies as a serious problem that requires a serious solution, such as an annulment.

¹¹¹ See *Ramirez*, 81 Cal. Rptr. 3d at 183 (noting that the trial court held that “this kind of fraud goes to the heart of the marital relationship”); see also *Bragg v. Bragg*, 28 P.2d 1046, 1048 (Cal. 1934).

¹¹² See *In re Marriage of Ramirez*, 81 Cal. Rptr. 3d 180, 182 (Cal. Ct. App. 2008) (noting that the husband stated his intention to remain in the marriage until “he got his share of money and property” from his wife); see also *Sec.-First Nat’l Bank of L.A. v. Schaub*, 162 P.2d 966, 970-71 (Cal. Dist. Ct. App. 1945) (noting that the husband changed the deed on his property to list he and his wife as joint tenants and annulling the deed based on the wife’s fraud regarding her intentions to perform her marital obligations).

¹¹³ CAL. FAM. CODE § 2200 (Westlaw 2013).

¹¹⁴ CAL. FAM. CODE § 2210(e) (Westlaw 2013).

¹¹⁵ CAL. FAM. CODE § 2210(a) (Westlaw 2013).

¹¹⁶ CAL. FAM. CODE § 2210(b) (Westlaw 2013).

¹¹⁷ *Maslow v. Maslow*, 255 P.2d 65, 68 (Cal. Dist. Ct. App. 1953) (stating that “[a] promise by one spouse before the marriage, express or implied, to have children, without any intention to keep the promise, is a sufficient fraud to void the marriage”).

¹¹⁸ CAL. FAM. CODE § 2210(d) (Westlaw 2013); *Vileta v. Vileta*, 128 P.2d 376, 376-77 (Cal. Dist. Ct. App. 1942) (sterility fraud); *Aufort v. Aufort*, 49 P.2d 620, 621 (Cal. Dist. Ct. App. 1935).

¹¹⁹ *In re Marriage of Ramirez*, 81 Cal. Rptr. 3d 180, 186 (Cal. Ct. App. 2008).

¹²⁰ *Rathburn v. Rathburn*, 292 P.2d 274, 277 (Cal. Dist. Ct. App. 1956).

¹²¹ *Handley v. Handley*, 3 Cal. Rptr. 910, 913 (Cal. Dist. Ct. App. 1960).

¹²² *Baker v. Baker*, 13 Cal. 87, 105-06 (Cal. 1859).

¹²³ CAL. FAM. CODE § 2210(f) (Westlaw 2013).

¹²⁴ CAL. FAM. CODE § 2210(c) (Westlaw 2013).

¹²⁵ CAL. FAM. CODE § 2210(b) (Westlaw 2013).

¹²⁶ *Dobson v. Dobson*, 193 P.2d 794, 795 (Cal. Dist. Ct. App. 1948) (granting an annulment where the husband was so inebriated during the marriage ceremony that he did not know what was taking place).

IV. THE *RAMIREZ* DECISION WILL NOT CREATE A FLOODGATE OF FRAUDULENT FIDELITY CLAIMS, NOR WILL IT BURDEN THE COURTS

Opponents of the *Ramirez* decision may be concerned about the effect the decision will have on the courts and marriage. However, the decision's narrow factual application, pre-existing case law limitations, and statutory limitations on annulment by fraud should limit the effect of *Ramirez* on marriage and the courts.¹²⁷ An important distinction is that a breach of fidelity is not the same as a fraud based on fidelity, thus, parties will not be able to seek an annulment every time there is an extramarital affair.¹²⁸ Case law also dictates that the right to seek an annulment can be waived by words or conduct.¹²⁹ If the party claiming fraud has knowledge of the misrepresentation, then there is no fraud.¹³⁰ Furthermore, a *Ramirez* claim is difficult to prove because it requires evidence of subjective intent.¹³¹ Finally, courts that are fearful of expanding grounds for annulment by fraud can limit expansion as the court in *In re Marriage of Nillo* did.¹³²

A. *RAMIREZ* NARROWLY APPLIES TO CLAIMS THAT CAN SHOW, BY CLEAR AND CONVINCING EVIDENCE, THE SUBJECTIVE INTENT TO COMMIT FRAUD

Ramirez will not create a flood of fraud based on fidelity claims because the moving party must show that the offending spouse intended

¹²⁷ CAL. FAM. CODE § 2210 (Westlaw 2013) (limiting annulment by fraud when "the party whose consent was obtained by fraud afterwards, with full knowledge of the facts constituting the fraud, freely cohabitated with the other as husband and wife"). In order to prove fraudulent fidelity, the subjective intent of the party must be proven. *In re Marriage of Ramirez*, 81 Cal. Rptr. 3d 180, 184 (Cal. Ct. App. 2008) ("Fraudulent intent not to perform a duty vital to the marriage state must exist in the offending spouse's mind at the moment the marriage contract is made."). Moreover, an annulment by fraud requires that the fraud was upon a matter that was to the "very essence the marriage relation." *In re Marriage of Meagher and Maleki*, 31 Cal. Rptr. 3d 663, 664 (Cal. Ct. App. 2005) (quoting *Marshall v. Marshall*, 300 P. 816, 818 (Cal. 1931)).

¹²⁸ *Sec.-First Nat'l Bank of L.A. v. Schaub*, 162 P.2d 966, 971 (Cal. Dist. Ct. App. 1945) (holding that a failure to fulfill a promise is not fraud).

¹²⁹ *Millar v. Millar*, 167 P. 394, 396 (Cal. 1917) (quoting CAL. CIV. CODE § 82(4)) (noting that a marriage may be annulled if "the consent of either party was obtained by fraud, unless such party afterwards, with full knowledge of the facts constituting the fraud, freely cohabitated with the other as husband and wife"); see also *Curtis v. Curtis*, 187 P.2d 921, 923-24 (Cal. Dist. Ct. App. 1947) (denying annulment after the husband lived with the wife for four and one-half months after discovering the alleged fraud).

¹³⁰ See *Curtis*, 187 P.2d at 923-24.

¹³¹ *In re Marriage of Ramirez*, 81 Cal. Rptr. 3d 180, 184-85 (Cal. Ct. App. 2008).

¹³² *In re Marriage of Nillo*, No. B201031, 2008 WL 5123955, *4 (Cal. Ct. App. 2008) ("Fraud sufficient to support an annulment has been found when a prospective spouse concealed his or her intention not to . . . terminate an intimate relationship with a third person after the marriage.").

to not be faithful at the moment the marriage contract was made.¹³³ Proving the subjective intent to not be faithful when a party says, “I do” is very difficult. In addition, the subjective intent must also be shown by clear and convincing evidence—the standard by which an annulment may be granted for fraud.¹³⁴ The *Ramirez* fraud decision relied on the admission by Jorge (the husband) to not remain faithful at the time of his vows.¹³⁵

Without subjective intent, even particularly damning factual circumstances will not qualify as a fraud based on fidelity. Imagine, as a hypothetical, that a groom is carrying on an affair with his bride’s sister before the wedding. One week after the wedding, the groom and bride’s sister go on a vacation together according to a plan they made prior to the wedding. On that vacation, the groom impregnates the bride’s sister. Circumstantially, those facts would indicate a subjective intent to not remain faithful. However, the groom could have actually believed at the time of his vows that he would remain faithful, and the vacation could have been planned to break off the affair. In this case, the groom’s indiscretion would be a breach of the marriage contract, not a fraud.¹³⁶ In addition, the circumstantial inference of an intent to commit fraudulent fidelity will probably not meet the high clear and convincing evidence standard.¹³⁷

B. PRE-EXISTING LIMITATIONS ON ANNULMENT BY FRAUD WILL ALSO LIMIT FRAUD BASED ON FIDELITY CLAIMS

Ramirez is not a sea-changing decision, because all annulment-by-fraud claims are limited by the essence-of-the-marriage test.¹³⁸ Thus, *Ramirez* will not undermine the institution of marriage. At first blush, the *Ramirez* decision is unsettling because it extended the grounds for annulment by fraud to a new area.¹³⁹ While it is well settled in California

¹³³ *Ramirez*, 81 Cal. Rptr. 3d at 184 (“Fraudulent intent not to perform a duty vital to the marriage state must exist in the offending spouse’s mind at the moment the marriage contract is made.”).

¹³⁴ *Williams v. Williams*, 178 Cal. App. 2d 522, 525 (Cal. Ct. App. 1960).

¹³⁵ *Ramirez*, 81 Cal. Rptr. 3d at 185-86.

¹³⁶ *See Sec.-First Nat’l Bank of L.A. v. Schaub*, 162 P.2d 966, 971 (Cal. Dist. Ct. App. 1945) (holding that a failure to fulfill a promise is not fraud).

¹³⁷ *See In re Jerome D.*, 101 Cal. Rptr. 2d 449, 453 (Cal. Ct. App. 2000) (“‘Clear and convincing’ evidence requires a finding of high probability. The evidence must be so clear as to leave no substantial doubt. It must be sufficiently strong to command the unhesitating assent of every reasonable mind.”).

¹³⁸ *See supra* notes 24-26 and accompanying text.

¹³⁹ *See In re Marriage of Ramirez*, 81 Cal. Rptr. 3d 180, 185-86 (Cal. Ct. App. 2008); *see also id.* at 186 (Gaut, J., concurring, in part, dissenting, in part) (noting that the majority relied on a case,

law that a marriage may be invalid and be annulled for reasons other than those enumerated in Family Code,¹⁴⁰ the fraud must relate to an essential matter to the marriage.¹⁴¹ This “essential matter limitation” should limit frivolous annulment by fraud claims¹⁴² and limit annulment by fraud to matters concerning sex¹⁴³ and whatever the future courts and society may determine is essential to marriage.¹⁴⁴

Other limitations will prevent a flood of fraud based on fidelity claims. A breach of fidelity is not the same as fraud based on fidelity, thus parties will not be able to seek an annulment every time there is an extramarital affair.¹⁴⁵ A party that enters into a marriage with the intent to remain faithful, but breaks the promise of fidelity, has not committed fraud.¹⁴⁶ “In order to constitute ground for annulment the fraudulent intent not to perform a duty vital to the marriage state must exist in the mind of the offending spouse *at the very moment that the contract of marriage is entered into.*”¹⁴⁷ The spouse may have had the intent to remain faithful when they entered into the marriage contract but simply was not able fulfill the marital promise of fidelity.¹⁴⁸

Sec.-First Nat'l Bank of L.A. v. Schaub, 162 P.2d 966 (Cal. Dist. Ct. App. 1945), that had never before been used to support “the proposition that the infidelity of a spouse, without more, constitutes a fraud which justifies an annulment”).

¹⁴⁰ Estate of DePasse, 118 Cal. Rptr. 2d 143, 154 (Cal. Ct. App. 2002) (noting that “[a] marriage may be invalid for reasons other than those enumerated in [California Family Code] sections 2200, 2201, and 2210”).

¹⁴¹ See *supra* notes 24-26 and accompanying text.

¹⁴² See *In re Marriage of Meagher and Maleki*, 31 Cal. Rptr. 3d 663, 664 (Cal. Ct. App. 2005) (reversing the trial court’s judgment to grant an annulment to the wife whose husband, before the marriage, “misrepresented his financial status and fraudulently induced her to invest in a business venture with him, with the intent to gain control of her assets”).

¹⁴³ See *supra* notes 27-42 and accompanying text.

¹⁴⁴ See Leff, *supra* note 89; McKinley *supra* note 89.

¹⁴⁵ Sec.-First Nat'l Bank of L.A. v. Schaub, 162 P.2d 966, 971 (Cal. Dist. Ct. App. 1945) (holding that a failure to fulfill a promise is not fraud).

¹⁴⁶ Bruce v. Bruce, 163 P.2d 95, 97 (Cal. Dist. Ct. App. 1945) (denying an annulment based on fraud even though the wife never lived with the husband after their marriage because the facts seemed to indicate that the wife intended to live with the husband at the time of the marriage, but before moving in, fell in love with another man).

¹⁴⁷ *Id.* at 97 (emphasis added) (citing Millar v. Millar, 167 P. 394, 396 (Cal. 1917)).

¹⁴⁸ Schaub, 162 P.2d at 971 (citing Bragg v. Bragg, 28 P.2d 1046 (Cal. 1934)) (“[A]lthough the parties, by the marriage itself, impliedly promise to fulfill the commonly understood obligations of husband or wife, the failure to fulfill them is not actionable fraud, that is to say, it does not make out a case of a promise made without intention to fulfill it . . . so as to furnish a sufficient ground for annulment.”); Bragg, 28 P.2d at 1048 (“Subsequent failure to fulfill prenuptial or postnuptial promises made in good faith does not of itself constitute actionable fraud for which cancellation of deeds between husband and wife may be had.”).

Statutes and case law also dictate that the right to seek an annulment can be waived by words or conduct.¹⁴⁹ If the couple continues to cohabitate after the infidelity to “try and work things out,” the wronged party may waive his or her right to an action for annulment.¹⁵⁰ Additionally, fraud based on fidelity requires actual deceit—parties cannot turn a blind eye to infidelity and then claim fraud.¹⁵¹ Fraud is limited to cases where a party does not know about the misrepresentation.¹⁵² If a party knew his or her spouse was being unfaithful but chose to marry that person anyway, in the hopes of reforming the party, then there is no misrepresentation and no fraud. Finally, annulments for fraud based on fidelity can be limited by the parties themselves because it is a voidable,¹⁵³ not void,¹⁵⁴ marriage. Some spouses may not seek to end their marriage because of infidelity.

C. NO ONE HAS SUCCESSFULLY MADE A *RAMIREZ* CLAIM FOR FRAUD BASED ON FIDELITY

The time that has passed since *Ramirez* is the most convincing evidence that the decision will not create a floodgate of fraud based on fidelity claims. Very few claims of fraud based on fidelity have made their way to the appeals courts in the four years since *Ramirez* was decided.¹⁵⁵ In *Nillo*, the court declined to grant an annulment for fraud

¹⁴⁹ CAL. FAM. CODE § 2210(d) (Westlaw 2013); *Millar v. Millar*, 167 P. 394, 396 (Cal. 1917) (quoting CAL. CIV. CODE § 82(4)) (noting that a marriage may be annulled if “the consent of either party was obtained by fraud, unless such party afterwards, with full knowledge of the facts constituting the fraud, freely cohabitated with the other as husband and wife”); see also *Curtis v. Curtis*, 187 P.2d 921, 923-24 (Cal. Dist. Ct. App. 1947) (denying annulment after the husband lived with the wife for four and one-half months after discovering the alleged fraud).

¹⁵⁰ See *Curtis*, 187 P.2d at 923-24.

¹⁵¹ *Id.*

¹⁵² CAL. FAM. CODE § 2210(d) (Westlaw 2013); *Millar*, 167 P. at 396; *Curtis*, 187 P.2d at 923-24.

¹⁵³ CAL. FAM. CODE § 2210 (Westlaw 2013) (noting that “[a] marriage is voidable and may be adjudged a nullity” on the basis of enumerated conditions, including if “[t]he consent of either party was obtained by fraud”).

¹⁵⁴ CAL. FAM. CODE §§ 2200, 2201 (Westlaw 2013) (noting that incestuous, bigamous and polygamous marriages are void from the beginning).

¹⁵⁵ See *In re Marriage of Nillo*, No. B201031, 2008 WL 5123955, *3, *5 (Cal. Ct. App. 2008) (citing *Ramirez* for its standard of review and denying annulment, finding that the wife “did not offer evidence that supported her contention that [her husband] was a pedophile before they married”); see also *In re Todt*, No. E044872, 2009 WL 2159628, *3-*4 (Cal. Ct. App. 2009) (citing *Ramirez* for its standard of review and stating, “[w]e decline to consider the issues of fraud or estoppel because the trial court properly decided the case based on the evidence that Malson and Todt were not living together and Malson was part of another domestic partnership when the declaration was executed”).

based on fidelity because of a factual insufficiency.¹⁵⁶ In *Todt*, the court declined to address the issue of fraud and instead granted an annulment on other grounds.¹⁵⁷ As it stands, the *Ramirez* legacy strongly indicates that the decision won't incite a flood of claims or "have unintended repercussions in family law practice"¹⁵⁸

However, there is a possibility that fraud based on fidelity claims could become more common. As *Ramirez* gains notoriety, the fraud based on fidelity claim could become part of every family law attorney's bag of tricks,¹⁵⁹ creating a situation wherein a *Ramirez* claim would show up in every dissolution proceeding where there is even a hint of a facts on which to base a fraud based on fidelity claim. This overuse is possible because an annulment is a great victory in a dissolution process.¹⁶⁰ Although the potential for more *Ramirez* claims exists, it does not amount to a probability that the courts will be flooded with frivolous *Ramirez* claims.

D. COURTS THAT ARE FEARFUL OF EXPANDING THE GROUNDS FOR ANNULMENT BY FRAUD CAN LIMIT THE EXPANSION JUST AS THE COURT DID IN *NILLO*

Part of the "floodgate fear" is that a decision like *Ramirez* will encourage courts to continue expanding the grounds for annulment by fraud. Indeed, this expansion almost happened in *Nillo*.¹⁶¹ In *Nillo*, a claim of fraud based on fidelity was made in reliance on *Ramirez*, but the claim involved an accusation that the groom's subjective intent was to

¹⁵⁶ *Nillo*, 2008 WL 5123955 at *5 (holding the wife "did not offer evidence that supported her contention that [the husband] was a pedophile before they married").

¹⁵⁷ *Todt*, 2009 WL 2159628 at *4 ("We decline to consider the issues of fraud or estoppel because the trial court properly decided the case based on the evidence that Malson and Todt were not living together and Malson was part of another domestic partnership when the declaration was executed.").

¹⁵⁸ *In re Marriage of Ramirez*, 81 Cal. Rptr. 3d 180, 186 (Cal. Ct. App. 2008) (Gaut, J., concurring, in part, dissenting in part).

¹⁵⁹ See *In re Marriage of Lean and Stewart*, No. A124777, 2012 WL 243095, *2, *10-11 (Cal. Ct. App. 2012) (The husband amended his response to the wife's petition for dissolution to include a request that the marriage be declared a nullity and, during the cross-examination of his wife, he attempted to bring forth his *Ramirez* claim for fraud based on fidelity.).

¹⁶⁰ See *Ramirez*, 81 Cal. Rptr. 3d at 186 (Gaut, J., concurring, in part, dissenting in part) (declaring that the decision could "[lead] to unnecessary litigation over title to property acquired by spouses during marriage which may not be considered community property if the marriage is deemed a nullity"). California Courts the Judicial Branch of California: Annulments www.courts.ca.gov/1037.htm; Cal. "After an annulment, it is like your marriage or domestic partnership never happened because it was never legal". (Family Code section 760, community property presumption, cannot apply to a marriage that never existed).

¹⁶¹ *In re Marriage of Nillo*, No. B201031, 2008 WL 5123955 (Cal. Ct. App. 2008).

marry the bride in order to have sexual relations with the bride's six-year-old daughter.¹⁶² After the marriage, the husband pled guilty to molesting the wife's two nephews.¹⁶³ The wife claimed that the husband knew at the time of the marriage that he was a pedophile.¹⁶⁴ She had an expert willing to testify that the husband formed his pedophilic preferences years earlier and was aware that he was a pedophile at the time of the marriage.¹⁶⁵ The *Nillo* majority found that the expert testimony lacked foundation and failed to prove by clear and convincing evidence that the husband was a pedophile at the time they married.¹⁶⁶ Thus, the court did not treat the *Ramirez* decision negatively, but refused to apply it on a factual basis.¹⁶⁷

Any expansion of annulment law can undermine marriage by reducing divorce proceedings.¹⁶⁸ Unlike annulments, divorce proceedings protect marriage by recognizing that the marriage existed and then enforcing the rights and obligations of the parties that chose to enter into the marriage contract. To this end, any continued expansion of annulment would violate the annulment golden rule—"a]nnulment should be the exception, not the rule."¹⁶⁹ Courts that are worried about expanding annulment by fraud can do exactly what the *Nillo* court did and narrowly apply the evidentiary standard for fraud-based claims.¹⁷⁰

V. FRAUDULENT FIDELITY SHOULD BE CODIFIED IN THE CALIFORNIA FAMILY CODE, SO THAT IT WILL BE EMBRACED BY THE JUDICIARY AND ITS EFFECT ON MARRIAGE CAN BE LIMITED

Ramirez was affirmed by the California Court of Appeals, and therefore, is good law.¹⁷¹ If the fears about *Ramirez* are well-placed, then legislative action is necessary to limit the *Ramirez* decision's effect on marriage and keep annulment by fraud from continuously being

¹⁶² See *id.* at *1-*3.

¹⁶³ *Id.* at *5 n.5.

¹⁶⁴ See *id.* at *5.

¹⁶⁵ *Id.* at *1-*2.

¹⁶⁶ *In re Marriage of Nillo*, No. B201031, 2008 WL 5123955, *4-*5 (Cal. Ct. App. 2008).

¹⁶⁷ *Id.* at *5.

¹⁶⁸ See *In re Marriage of Ramirez*, 81 Cal. Rptr. 3d 180, 186 (Cal. Ct. App. 2008) (Gaut, J., concurring, in part, dissenting in part) (declaring that the majority's decision could "[lead] to unnecessary litigation over title to property acquired by spouses during marriage which may not be considered community property if the marriage is deemed a nullity").

¹⁶⁹ *Id.* (Gaut, J., concurring, in part, dissenting in part).

¹⁷⁰ *In re Marriage of Nillo*, No. B201031, 2008 WL 5123955, *3-*5 (Cal. Ct. App. 2008). (stating that "the state has a keen interest in ensuring that no marriage is declared void unless fraud is shown by clear and convincing evidence" and finding that the wife failed to meet this burden).

¹⁷¹ *Ramirez*, 81 Cal. Rptr. 3d at 186 (Fourth District Court of Appeal).

extended. If the fears about the *Ramirez* decision are misplaced, and *Ramirez* will have little effect on marriage and the court system, then *Ramirez* should be accepted by the judiciary as good law.¹⁷² One way to make the judiciary accept fraudulent fidelity is through codification.

A. LEGISLATIVE ACTION SHOULD BE USED TO LIMIT *RAMIREZ*

Limiting all of the grounds for annulment is the easiest way to limit the effect of the *Ramirez* decision (fraudulent fidelity) on the courts and marriage. In *Estate of DePasse*, the court stated a marriage may be annulled for reasons other than those listed in the family code.¹⁷³ A simple piece of legislation could overturn all of the *DePasse*-type holdings and require that a marriage may only be annulled the reasons stated in the family code. If more discretion for the judiciary is desirable, then legislation could be enacted in order to specifically limit annulments by fraud. The legislation could state that annulment by fraud is limited to instances where the fraud relates to consummation, reproduction, antenuptial pregnancy by someone other than the spouse, and fraud based on fidelity. For a further and more prudent limitation, the legislation should require a clear and convincing standard for proving the subjective intent of the spouse committing fraud based on fidelity in order to avoid a flood of frivolous claims.

However, despite any benefit that legislation could confer, it is unlikely that the California Legislature would act upon the problems that *Ramirez* poses. *Ramirez* has such a narrow application it will not garner the attention necessary in order to spur the California Legislature into action.

B. "THE BETTER PART OF VALOUR IS DISCRETION"¹⁷⁴

On the other hand, limiting *Depasse*-type holdings, or limiting judicial discretion in annulment law, is not desirable. *Depasse* is an example of judicial discretion in an area of law that demands it.¹⁷⁵ Eliminating *Depasse*-type holdings would limit the judiciary's ability to reasonably expand annulment law to rectify an act of grievous fraud that

¹⁷² *Supra* text accompanying notes 127-154.

¹⁷³ *Estate of DePasse*, 118 Cal. Rptr. 2d 143, 154 (Cal. Ct. App. 2002) (noting that "[a] marriage may be invalid for reasons other than those enumerated in [California Family Code] sections 2200, 2201, and 2210").

¹⁷⁴ WILLIAM SHAKESPEARE, *THE FIRST PART OF HENRY THE FOURTH*, act 5, sc. 4.

¹⁷⁵ *DePasse*, 118 Cal. Rptr. 2d at 145, 156 (finding there was no marriage for the purposes of property division when the couple was married in the hospital on the day before the wife died of a terminal illness).

isn't covered by the legislative list.¹⁷⁶ Limiting judicial discretion in the area of annulment by fraud would also be against public policy because "[i]t is not in the public interest to protect such a marriage to the serious detriment of the defrauded party."¹⁷⁷ The need for judicial discretion probably outweighs the need for *Ramirez* be codified because the legislature cannot encapsulate all of the grounds for fraud in an exclusive list.¹⁷⁸

CONCLUSION

The *Ramirez* decision is good law despite the colorful facts and the natural fears that surround annulment. As a result, *Ramirez* should be embraced by the judiciary or codified in the California Family Code. Without codification or acceptance by the judiciary, marriage can be undermined by predatory parties who commit fraud upon unwitting spouses. Accordingly, it should be embraced as a necessary advancement of the state's interest in marriage and protect its citizens from predatory parties.

¹⁷⁶ *Douglass v. Douglass*, 307 P.2d 674, 676 (Cal. Dist. Ct. App. 1957) (granting an annulment "where the fraud is so grievous that it places the injured party in a relationship that is intolerable because it cannot be honorably endured").

¹⁷⁷ *Wolfe v. Wolfe*, 389 N.E.2d 1143, 1145 (Ill. 1979) (granting an annulment for a fraud perpetrated by wife whereupon she misrepresented to husband that her previous husband had died in order to induce the second marriage in accord with the new husband's Catholic beliefs).

¹⁷⁸ *See Douglass*, 307 P.2d at 675-76 (noting that the wife's "right to an annulment [was] so clear as to make it wholly unnecessary for [the court] to concern [itself] with the question whether our concept of justice has found expression in the decisions of other courts").